STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2023AP001747 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KYLE A. SCHAEFER,

Defendant-Appellant.

On notice of appeal from an order entered in the
Marathon County Circuit Court,
the Honorable Michael K. Moran, presiding

BRIEF OF DEFENDANT-APPELLANT

ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1779
hinkela@opd.wi.gov

Attorney for Kyle A. Schaefer

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ISSUE PRESENTED

1. The state detained Kyle Schaefer and filed a petition to terminate his conditional release under Wis. Stat. § 971.17(3)(e). However, the state did not, as the statute requires, submit the required notice to the public defender within 72 hours. The circuit court accordingly dismissed the petition, but permitted the state to refile a substantially identical petition, which it later granted. Did the circuit court err in determining that it regained competency to proceed based on the state's refiling of its dismissed petition?

   The circuit court decided it did have competency. This Court should reverse.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is necessary; this case can be resolved by the application of well-established law to the particular facts.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

In 2016, the circuit court committed Mr. Schaefer to the care of the Department of Health Services for 45 years. (67). Mr. Schaefer had been charged with shooting his aunt and uncle without apparent provocation. (2:4). The circuit court entered

an NGI commitment on the agreement of both parties. (72:3-4). Two different examining doctors concluded, during the proceedings leading to the NGI, that Mr. Schaefer had previously-undiagnosed schizophrenia and that and commitment, rather than criminal conviction, was appropriate. (52; 58). The court ordered Mr. Schaefer placed in institutional care and involuntarily medicated. (69).

In April of 2021, the circuit court found that conditional release would not pose a significant risk of harm to Mr. Schaefer or others, and so ordered a release plan be submitted. (164). In August of that year, Mr. Schaefer was released to reside independently at the Bridge Street Mission Apartments in Wausau. (175:1; 176).

However, on September 2, 2022, DHS filed a petition to revoke Mr. Schaefer's conditional release, saying that "due to lack of engagement in programming" required by his living in the Apartments, Mr. Schaefer no longer had a permanent place to live. (180).

A few weeks later, Mr. Schaefer's counsel filed a motion to dismiss the petition to revoke release. (187). The motion recited that, though Mr. Schaefer had been detained on September 1, and the petition had been filed on September 2, counsel had not been alerted of the petition until she was contacted for a hearing about it 19 days later, on September 21. (187:1-2). The motion argued that this delay violated Wis. Stat. § 971.17(3), which requires DHS to submit the petition

and showing of probable cause to the "regional office of the state public defender… within 72 hours after the detention, excluding Saturdays, Sundays and legal holidays." (187:3-4). The motion cited *State v. Olson*, 2019 WI App 61, 389 Wis. 2d 257, 936 N.W.2d 178, in which this Court held that when DHS violates § 971.17(3) by failing to give timely notice, the circuit court loses competency to proceed. (187:5).

The circuit court held a hearing, concluded that the public defender had not been timely notified, and dismissed the petition to revoke. (208:8; App. 10). It then asked a probation and parole agent at the hearing "are you going to refile that"; the agent said he was not sure. (208:8; App. 10). But the same day, sometime after the hearing ended at 3:07 p.m., DHS did file a new petition: actually, the petition was identical to the one that had just been dismissed, save for the signature date. (208:9; App. 11; 180; 190).

Mr. Schaefer then moved to dismiss the new petition, arguing that the loss of competency described in *Olson* could not be remedied by simply refiling the same petition after dismissal. (194). The circuit court held a second hearing, and concluded that the refiled petition could proceed. (209:7-9; App. 19-21). After taking evidence, it revoked Mr. Schaefer's conditional release. (209:41).

Mr. Schaefer appeals. (241).

ARGUMENT

The state's violation of the statutory deadline deprived the court of competency to decide the revocation petition; the court erred in permitting the state to "paper over" this defect by refiling a substantially identical petition.

At a hearing after Mr. Schaefer's counsel alerted the court that neither the petition to revoke nor the probable cause statement had been submitted to the appropriate regional office of the public defender, the court took testimony from the probation agent who had generated the documents. (208:6; App. 8). (The court had also briefly heard from this agent at the prior hearing. (207:7-8).) This agent testified that the documents had been uploaded to CCAP, but had not been sent to the regional office of the public defender. (208:7). Accordingly, the court, saying "[w]e follow the statutes," dismissed the petition. (208:8; App. 10).

This was the correct result under *State v. Olson*, 2019 WI App 61, 389 Wis. 2d 257, 936 N.W.2d 178. There, DHS detained Olson for eight days before it filed a petition to revoke and a probable cause statement in the circuit court and submitted the same documents to the regional office of the public defender. *Id.*, ¶6. This Court held that the 72-hour time limit in Wis. Stat. § 971.17(3)(e) is mandatory, and thus DHS, in violating it, deprived the circuit court of competency to proceed on the revocation. *Id.*, ¶34.

Here, DHS again failed to submit a probable cause statement or petition to revoke to the public defender, this time for at least 20 days (it's not clear from the record that DHS submitted it then, either, but an SPD attorney at least became aware of the filings by that time). (187:1-2). The circuit court rightly concluded that, as in *Olson*, this meant it lacked competency to consider the proposed revocation, and accordingly dismissed it. (To the extent the state argued below that it had, in fact, complied with Wis. Stat. § 971.17(3)(e), (188), it did not appeal the circuit court's dismissal of its original position, so any claim on that score is not before this Court. *See* Wis. Stat. § 808.04(4).)

The state then filed a petition to revoke that was identical to the dismissed one except for the dates. (180; 190). Mr. Schaefer moved to dismiss this petition as well. He noted the state had, by failing to submit a timely petition or probable cause statement to the public defender, detained him illegally once the 72 hours had passed. He argued the state couldn't cure this illegal detention by continuing to detain him and giving yet *later* notice of that detention. (92:3-5). The motion cited *State ex rel. Sandra D. v. Getto*, 175 Wis. 2d 490, 502, 498 N.W.2d 892 (Ct. App. 1993).

Sandra D. was initially detained under Wis. Stat. ch. 51. When the medical reports were not turned over to her counsel, the court dismissed the petition for commitment. *Sandra D.*, 175 Wis. 2d at 496. The same day, authorities filed a new petition and Sandra D. remained detained. This petition was soon

converted to a ch. 55 protective placement case in accord with the then-applicable (and since-renumbered) statutes. *Sandra D.*, 175 Wis. 2d at 495-96. A protective placement hearing was set, but the medical reports were not provided to Sandra D. at least 96 hours before the hearing, as the statutes required. *Id.* at 496. Sandra D. moved to dismiss on this basis, and the motion was granted again granted. *Id.*

After this dismissal, the authorities filed a third pleading alleging the same facts, and Sandra D. remained confined. Eventually the court granted protective placement and guardianship. *Id.* at 497.

This Court reversed. It noted "the county's concern that releasing Sandra D. under the medical facts of the case might have engendered a threat to her welfare" but also that "the very people who were most aware of that threat … failed to submit the required reports in a time and manner plainly required by law." *Id.* It continued that "as much as we may sympathize with the county's position and the difficulties that are apparent on the facts of the case, we cannot ignore that law." *Id.* at 497-98.

This Court said that the "statute does not allow continued, multiple periods of detention upon repeated assurances that probable cause exists for the subject's temporary, emergency detention. Once probable cause for the temporary emergency detention is established, the statute *then* requires that a final hearing on the merits of the petition be held, and the proceedings

brought to conclusion, within thirty days." *Id.* at 501 (emphasis in original).

The Court concluded that reversal of the guardianship and placement "may not be a very desirable result, given the substance of the county's evidence at the final hearing in this matter, for any subsequent proceedings will have to be based on 'new' facts." But, it said, "we must decide in this case whether the plain statutory mandates can be suspended because, despite its repeated failure to heed those mandates, the county does not consider Sandra D.'s release from custody to be in her best interest; and we have concluded they may not." *Id.* at 502.

Here, the circuit court attempted to distinguish *Sandra D.* Its discussion, though, establishes no meaningful difference that case and this one:

> the question comes down then based upon your argument… is whether the same grounds could be used as for the new filing. These are ongoing grounds, as I read in the probable cause statement. The grounds that I read are no ongoing housing options, no form of income, no residence of residence issues, and other issues of that nature. Not participating…. That was not helping. Not following rules. Not signing contracts. Those are the allegations. And these are ongoing. Those are new allegations of something—of some type of new incident of some sort. These are ongoing.
>
> ….

> I believe because the allegations in the probable cause are more ongoing, their status, their—they could be realleged in a new petition right away. The basis that it's not a "new set of facts," quote, unquote, is not detrimental to the refiling of this case.

(209:7-8; App. 19-20).

There is no basis for the circuit court's conclusion that the allegations here—a lack of housing and income—are "more ongoing" than those at issue in *Sandra D.* Sandra D.'s appeal was not from a ch. 51 mental commitment, although the case had begun that way. It was from a protective placement under ch. 55. "Chapter 51 is designed to accommodate short-term commitment and treatment of mentally ill individuals, while ch. 55 provides for long-term care for individuals with disabilities that are permanent or likely to be permanent." *Fond du Lac County v. Helen E.F.*, 2012 WI 50, ¶21, 340 Wis. 2d 500, 814 N.W.2d 179. There is no indication in the *Sandra D.* opinion that this Court regarded Sandra D.'s condition—which, as a basis for ch. 55 placement, was "likely to be permanent"—as having changed since her initial detention. Rather, the Court expressed regret that the "facts" alleged in the petitions below—which in all likelihood continued to obtain—could not form a basis for a new proceeding because of the petitioner's errors. *Sandra D.*, 175 Wis. 2d at 502.

Here, the result must be the same. The state's petition alleged various facts in support of its bid to terminate Mr. Schaefer's conditional release. That

these facts were continuing conditions, rather than short-term events, does not permit the state to violate mandatory time limits with impunity. Such a rule would, in effect, do away with the time limits altogether, as the state could "cure" any time limit violation—and the associated unlawful detention—simply by starting over.

This would be contrary to the teaching of *State v. Olson*. But that is not the only case in which this Court has rejected an attempt to extend a mandatory statutory time limit simply by refiling a petition. In *Dane County v. Stevenson L.J.*, 2009 WI App 84, ¶13, 320 Wis. 2d 194, 768 N.W.2d 223, the Court affirmed a trial court order dismissing a second emergency detention statement under Wis. Stat. ch. 51.

Notably, in Stevenson *L.J.*, even the fact that the second statement contained new allegations could not save the unlawful detention: "the fact that the treatment director's subsequent statement of emergency detention contained additional allegations of dangerousness and was filed in a different county by a different detaining authority does not cure its defect." This was because the "statement's shortcoming does not lie in its venue or in its content; instead, it lies in the fact that the detention it sought to execute was contrary to statutory requirements and was thus unlawful." *Id.* The same is true here: Mr. Schaefer's confinement became unlawful once 72 hours had passed; the delivery of a new (basically identical) petition nearly a month later did not cure

this illegal detention. *See also Kindcare v. Judith G.*, 2002 WI App 36, ¶¶17-18, 250 Wis. 2d 817, 640 N.W.2d 839 (violation of 72-hour time limit for hearing in ch. 55 case could not be "papered over" by the filing of a successive petition; "the hearing must be held within seventy-two hours of the *detention*, not the filing of the petition" (emphasis in original)).

CONCLUSION

Because the state violated the mandatory statutory time limit to notify the public defender of Mr. Schaefer's detention, and because this violation was not cured by the refiling of a substantially identical petition, Mr. Schaefer respectfully requests that this Court reverse the circuit court's order terminating his conditional release and order that he be placed on supervision in the community.

Dated this 17th day of January, 2023.

Respectfully submitted,

Electronically signed by
Andrew R. Hinkel

ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1779
hinkela@opd.wi.gov

Attorney for Kyle Schaefer

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,113 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 17th day of January, 2024.

Signed:
Electronically signed by
Andrew R. Hinkel
ANDREW R. HINKEL
Assistant State Public Defender